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## The Path to Obergefell: Saying “I do” to New Judicial Federalism?

Christine L. Nemacheck

*Wilson and Martha Claiborne Stephens Associate Professor of Government and Fellow with the Center for Liberal Arts at the College of William & Mary*

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## The Path to *Obergefell*: Saying “I do” to New Judicial Federalism?

Christine L. Nemacheck\*

On June 26, 2015, the Supreme Court announced its decision in *Obergefell v. Hodges*<sup>1</sup> and its companion cases. In summarizing the Court’s majority opinion from the bench, Justice Kennedy asserted that although liberty is most commonly protected by our democratic system, “there has been substantial public deliberation over the past decades and it is a central premise of our Constitution that fundamental rights depend on the outcome of no elections.”<sup>2</sup> In deciding that the Constitution protected the right of couples, whether same or different-sex partners, the Court effectively removed the question of same-sex marriage from the legislative arena and the voting booth.<sup>3</sup> More significantly for the manner in which the issue had been dealt with up to that point, *Obergefell* also ended the important role for state courts’ due process and equal protection analysis under their own state constitutions. Some forty-plus years after the Court had dismissed “for want of a substantial federal question,” a gay couple’s appeal of Minnesota’s refusal to grant them a marriage license,<sup>4</sup> the majority held that based on the fundamental right to marry, and to ensure equal protection under the law, states

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\* Wilson and Martha Claiborne Stephens Associate Professor of Government and Fellow with the Center for Liberal Arts at the College of William & Mary. I want to thank Nick LaRowe, Michael Fix, Tracey George and audience members at the 2016 Midwest Political Science Association’s annual conference for their helpful questions and comments on an earlier version of this paper.

<sup>1</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

<sup>2</sup> *Obergefell v. Hodges*, OYEZ, <https://www.oyez.org/cases/2014/14-556> (Opinion Announcement-June 26, 2015 (Part 1)).

<sup>3</sup> *Obergefell*, 135 S.Ct. 2584 (2015).

<sup>4</sup> *Baker v. Nelson*, 409 U.S. 810, 810 (1972); JOSEPH MELLO, THE COURTS, THE BALLOT BOX, AND GAY RIGHTS: HOW OUR GOVERNING INSTITUTIONS SHAPE THE SAME-SEX MARRIAGE DEBATE (2016).

must issue marriage licenses to same-sex as well as opposite-sex couples.<sup>5</sup>

Interest groups and marriage equality supporters roundly lauded the Court's decision in *Obergefell*. Groups like Lambda Legal, Gay and Lesbian Advocates and Defenders (GLAD), The National Center for Lesbian Rights (NCLR), and the American Civil Liberties Union (ACLU), had long been active in the legal and political campaigns to realize that goal. These groups developed sophisticated strategies, individually and in tandem, to advance gay rights, and eventually to achieve marriage equality nationwide.<sup>6</sup>

The gay rights movement generally, and the fight for marriage equality in particular, are sometimes likened to the civil rights movement of the 1950s and 1960s. The prominence of *Loving v. Virginia*<sup>7</sup> as precedent for the Court's decision in *Obergefell* is just one of the reasons for such comparisons, as are the similarities between the legal roles played by organizations like Lambda Legal and the National Association for the Advancement of Colored People Legal Defense and Education Fund.<sup>8</sup> But there are also important differences between the movements that are crucial to understanding the path to marriage equality.<sup>9</sup>

The main legal venue for achieving an end to legalized racial segregation, Jim Crow laws and anti-miscegenation statutes was the federal court system.<sup>10</sup> But the state court systems played a far more

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<sup>5</sup> *Obergefell*, 135 S.Ct. at 2607 (2015).

<sup>6</sup> LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA (Leslie J. Gabel-Brett & Kevin M. Cathcart eds., 2016).

<sup>7</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>8</sup> ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION (2006).

<sup>9</sup> Beyond the differences I discuss here, there is disagreement about whether it is appropriate to compare the discrimination generally experienced by gays and lesbians to that experienced by African-Americans, particularly in terms of slavery, Jim Crow, and continued racism. See Karen Grigsby Bates, African-Americans Question Comparing Gay Rights Movement to Civil Rights, NPR (July 2, 2015, 4:30 PM), <http://www.npr.org/2015/07/02/419554758/african-americans-question-comparing-gay-rights-movement-to-civil-rights>. My focus here is on the movements themselves, not on the kind or severity of the discrimination per se.

<sup>10</sup> See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); see also J.W. PELTASON, 58 LONELY MEN:

important role in the fight for marriage equality.<sup>11</sup> The many reasons for the difference in strategies are beyond the scope of the present discussion, but the evidence is clear that gay rights groups strategically chose to wage their war for marriage equality in the states. This was not, however, a war they intended to win exclusively in those state courts. Instead, each victory they amassed in the states helped to shore up the final battle they intended to have before the United States Supreme Court to secure the right to marry as protected by the Constitution.<sup>12</sup>

In a seminal 1977 law review article, Justice Brennan proposed new judicial federalism as a strategy to protect minority rights in the face of an increasingly conservative Supreme Court.<sup>13</sup> He conceived new judicial federalism as a process of litigating cases in the state courts, relying on state constitutional law to protect individual rights and liberties.<sup>14</sup> In this pages that follow, I examine the role of new judicial federalism in the fight for marriage equality. Did gay rights groups seize on new judicial federalism as a strategy to achieve marriage equality? Are state courts’ decisions on same-sex marriage in line with Justice Brennan’s idea of new judicial federalism? How does the ultimate nationalization of marriage equality in *Obergefell* comport with the idea of judicial federalism?

Here, I provide evidence that the Supreme Court’s 2015 recognition of marriage equality was the culmination of new judicial federalism, albeit with an important twist. It represents strategic decisions made to win the right to marry in a subset, but not all, of

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SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1971). Congress was, of course, crucially important in the battle for civil rights as evinced by the Civil Rights Acts of 1957 and 1964, the 1965 Voting Rights Act, and the 1968 Fair Housing Act, among others. But, here I am focused particularly on the role of the federal and state court systems.

<sup>11</sup> Again, it can be noted that the gay rights movement was not focused exclusively on the courts. They placed significant importance on achieving progress in public opinion as well as in state ballot measures and state legislatures. *Winning Marriage: What We Need to Do*, NEW JERSEY WORKING GROUP (June 21, 2005), <https://s3.amazonaws.com/s3.documentcloud.org/documents/2108219/final-marriage-concept-paper.pdf>. Here, however, I am focusing on the role of state courts.

<sup>12</sup> *Id.*

<sup>13</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

<sup>14</sup> *Id.* at 503.

the states before taking the issue to the Supreme Court.<sup>15</sup> While Justice Brennan's conception of new judicial federalism embraced state constitutional protection as an end in and of itself, leaders of the marriage equality movement clearly envisioned these victories as the means to a different end: protection under the Constitution.<sup>16</sup>

#### NEW JUDICIAL FEDERALISM

In reaction to what he saw as the paring back of civil liberties protections, particularly criminal suspects' rights, by the Supreme Court, Justice Brennan published "State Constitutions and the Protection of Individual Rights," in the January 1977 *Harvard Law Review*.<sup>17</sup> In this article, Justice Brennan made both an objective argument about the roles of state and federal courts in a federal system of government and a normative argument about the responsibilities those state courts carried when the federal courts were willing to allow greater restrictions on individual rights through their analysis of the Constitution's guarantees.<sup>18</sup> Justice Brennan asserted that it is "both necessary and desirable" that no less than federal courts, state courts "are and ought to be the guardians of our liberties."<sup>19</sup>

Justice Brennan discussed the power of the state courts to make decisions in cases concerning individual rights based exclusively on their own state constitutions.<sup>20</sup> He emphasized that even on issues to which the federal constitution applies, the state court could and should independently rely on its state constitutional provisions to resolve the case.<sup>21</sup> Further, he argued, if a state constitutional provision is identical to the federal provision, it remains the authority of the state court to interpret its own constitutional provision to

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<sup>15</sup> *Winning Marriage: What We Need to Do*, *supra* note 11.

<sup>16</sup> *Id.*

<sup>17</sup> Brennan, Jr., *supra* note 13.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 491.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 491.

provide greater protection than the federal courts have understood its companion clause in the Constitution to provide.<sup>22</sup>

Justice Brennan cited several state high court opinions to support his argument.<sup>23</sup> One case, in which the Hawaii Supreme Court relied on its own interpretation of a Hawaii constitutional provision that was identical to a United States Constitutional provision, the Hawaii court observed that while relying on its own provision “results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law.”<sup>24</sup>

Justice Brennan’s call for renewed use of judicial federalism has been the subject of significant scholarship.<sup>25</sup> Evidence from a number of empirical studies of state court reliance on their own state constitutions is perhaps mixed at best.<sup>26</sup> Although various studies do indicate that states cited their own state constitutions more frequently in the years after Brennan’s call,<sup>27</sup> it is not clear that those cases lead to an expansive interpretation of rights protection nor that state courts relied on their own constitutions to the exclusion of the United States Constitution.<sup>28</sup> Instead, several studies cited a lock-step decision pattern where the state court application of its own constitution fell in line with the federal courts interpretation of its similar provision.<sup>29</sup>

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<sup>22</sup> *Id.* at 500.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 500.

<sup>25</sup> E.g., Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L. Q. 429 (1988); Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L. J. 863 (1991); G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, PUBLIUS: J. OF FEDERALISM, Spring 1994, at 63; G. Alan Tarr, *New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997).

<sup>26</sup> Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37 (1992).

<sup>27</sup> John Kincaid & Robert F. Williams, *The New Judicial Federalism: The States’ Lead in Rights Protection*, 65 J. OF ST. GOV’T 50 (1992).

<sup>28</sup> Latzer, *supra* note 25, at 863; Emmert & Traut, *supra* note 21, at 37.

<sup>29</sup> *Id.* at 39.

In addition to empirical evidence that calls into question the effectiveness of new judicial federalism, it has also been criticized as a framework for understanding the appropriate roles of state and federal courts in a federal system. In his discussion of the concept, particularly as it concerns aspects of the criminal justice system, Barry Latzer criticized the confusion new judicial federalism may create for law enforcement.<sup>30</sup> And, in a more general sense, Latzer argued against state courts employing new judicial federalism to essentially subvert federal law.<sup>31</sup> Within the context of same-sex marriage, others have pointed out the limitations inherent when rights protection is provided by the state courts; if it is a compromise allowing some states to protect individual rights and others to avoid doing so, “marriage equality is an oxymoron.”<sup>32</sup>

While the evidence for the “success” of new judicial federalism is mixed, it bears considering how “success” is defined. As an end in itself, it may well be the case that new judicial federalism fails to fulfill its promise as an alternative to a progressive Supreme Court protecting individual rights and liberties articulated in the Constitution. But, as a means to an end, in this case protecting the fundamental right to marry the person of one’s own choosing, the fight for marriage equality provides strong evidence of its potential.

#### MARRIAGE EQUALITY AND NEW JUDICIAL FEDERALISM

When it had an early opportunity to adjudicate the question of same-sex marriage, the Supreme Court dismissed a challenge to Minnesota’s marriage statute for want of a substantial federal question.<sup>33</sup> Given the Supreme Court’s unwillingness to consider same-sex marriage, one strategy for pursuing marriage equality

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<sup>30</sup> Latzer, *supra* note 25, at 863.

<sup>31</sup> *Id.*

<sup>32</sup> Mae Kuykendall, *The Converging Logic of Federalism and Equality in Same-Sex Marriage Recognition*, AMERICAN CONSTITUTION SOCIETY ISSUE BRIEF 2 (Sept. 2012), [http://www.acslaw.org/sites/default/files/Kukendall\\_-\\_Converging\\_Logic\\_of\\_Federalism\\_and\\_Equality\\_0.pdf](http://www.acslaw.org/sites/default/files/Kukendall_-_Converging_Logic_of_Federalism_and_Equality_0.pdf).

<sup>33</sup> *Baker v. Nelson*, 409 U.S. 810 (1972).

would have been for proponents to move the debate to a different venue. Indeed, this is exactly what Justice Brennan asserted ought to happen in his seminal piece on judicial federalism. But, especially in the 1970s, it was not clear there was a “gay rights strategy” generally, let alone a movement for same-sex marriage.

The few cases that came in the aftermath of *Baker v. Nelson* were uncoordinated attempts by gay and lesbian couples to pursue marriage (or in at least one case, divorce).<sup>34</sup> There were at least four more failed efforts to obtain the right to marry for same-sex couples during the 1970s and early 1980s. The cases occurred in both the federal and state courts, including Kentucky, Washington, Colorado, and Pennsylvania.<sup>35</sup> In every case, the couples asking for recognition (or dissolution) of same-sex marriage were unsuccessful.<sup>36</sup> In addition to these failed judicial efforts in states with traditional marriage laws, there were also a number of early legislative defeats as some states began enacting laws that explicitly banned same-sex marriage.<sup>37</sup> Maryland was the first to do so in 1973.<sup>38</sup>

In these early years of the gay rights movement, there were significant debates about whether the LGBT (lesbian, gay, bisexual, and transgender) community should work toward a goal of marriage equality at all. Some argued that marriage itself was a patriarchal institution that gay and lesbian couples ought to avoid altogether.<sup>39</sup>

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<sup>34</sup> In one Pennsylvania case that reached the Pennsylvania Superior Court, the appellant, asserting they had entered into a common-law marriage in 1970, asked the court to grant a divorce in 1984. *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984).

<sup>35</sup> DANIEL R. PINELLO, *AMERICA’S STRUGGLE FOR SAME-SEX MARRIAGE* 22 (2006); LESLIE J. GABEL-BRETT & KEVIN M. CATHCART, *LOVE UNITES US* 6–7 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016) (Introduction).

<sup>36</sup> MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013); WILLIAM N. ESKRIDGE JR., *THE FIRST MARRIAGE CASES, 1970-74, LOVE UNITES US* (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016); PINELLO, *supra* note 35; GABEL-BRETT & CATHCART, *supra* note 35.

<sup>37</sup> KLARMAN, *supra* note 35, at 21–22.

<sup>38</sup> SHARON LATTMAN-HICKS, *PUTTING FAITH TO THE TEST: BLACK LEADERS AND THE MARYLAND VICTORY* in *LOVE UNITES US* 203 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016); *Winning the Freedom to Marry Nationwide: The Inside Story of a Transformative Campaign*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/how-it-happened#section-2>.

<sup>39</sup> ESKRIDGE, *supra* note 35.



Rather than embracing traditional marriage and its emphasis on ownership and property, these activists argued that gay and lesbian couples ought to seek acceptance of their relationships despite their differences and outside the scope of marriage.<sup>40</sup>

There was agreement among gay rights activists that state sodomy laws, which in the early 1960s existed in all fifty states, did significant damage to same-sex couples.<sup>41</sup> Sodomy laws became a vehicle used to harass gay and lesbian couples; convictions under these laws also perpetuated discrimination in employment, as well as child custody rights.<sup>42</sup> However, a combination of factors, including the development of a new Model Penal Code absent a sodomy provision, adopted by states beginning in 1961, as well as the movement towards women's liberation and reproductive rights, led some states to decriminalize same-sex intimacy.<sup>43</sup> Illinois was the first state to remove its sodomy law in 1961; Connecticut became the second to do so in 1971.<sup>44</sup> States continued to remove or revise their sodomy statutes through the modification of their penal codes through the 1970s. But, as legislative revisions of penal codes slowed down toward the end of the 1970s, so did state action to legislatively remove sodomy laws. In some states, efforts to eliminate sodomy laws moved to the state courts. New York and Pennsylvania were the first states to decriminalize sodomy through the courts; each did so in 1980.<sup>45</sup>

In 1982, the ACLU of Georgia found a good test case through which to mount a constitutional challenge to that state's sodomy statute. Michael Hardwick, a gay man living in Atlanta, was arrested

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<sup>40</sup> PAULA L. ETTLEBRICK, *SINCE WHEN IS MARRIAGE A PATH TO LIBERATION?* in LOVE UNITES US 34 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016).

<sup>41</sup> KEVIN M. CATHCART, *THE SODOMY ROUNDTABLE* in LOVE UNITES US 51 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 52–53.

<sup>44</sup> *Id.* at 51–52.

<sup>45</sup> See Melinda D. Kane, *Timing Matters: Shifts in the Causal Determinants of Sodomy Law Decriminalization, 1961–1998*, 54 SOC. PROBS. 211 (2007). More importantly, during the 1960s and 1970s, the United States Supreme Court had also made important strides in recognizing a constitutional right to privacy. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

for having private, consensual sex in his own home. Even though the district attorney refused to prosecute, Hardwick took the case to federal court to argue that the law unfairly targeted him.<sup>46</sup>

Hardwick’s case provided a vehicle through which gay rights advocates could work cooperatively. While working on the case in 1983, Abby Rubenfeld—then legal director of Lambda Legal—organized a group to coordinate gay rights advocates’ efforts to fight sodomy laws; that group was known as the Ad Hoc Sodomy Task Force.<sup>47</sup> The Task Force, in different configurations over time, was essential in developing a national strategy to eradicate sodomy laws across the United States.<sup>48</sup> But the first case on which they were involved was anything but successful.

Justice Brennan’s new judicial federalism might have guided the Task Force toward a state-centric strategy, but Hardwick had challenged the constitutionality of the Georgia statute in the Federal District Court in Georgia, so they instead took the case on appeal to the Supreme Court.<sup>49</sup> It led to a brutal defeat. In *Bowers v. Hardwick*, the Supreme Court reached a 5-4 decision upholding the Georgia law.<sup>50</sup> The majority narrowly framed the legal question to conclude that the Constitution did not provide a fundamental right to engage in homosexual sodomy.<sup>51</sup>

Over the late 1980s and 1990s, the Sodomy Law Task Force met to develop strategy and share ideas about how to best focus their efforts on eliminating state sodomy laws in the wake of *Bowers*.<sup>52</sup> There were four primary gay and lesbian legal organizations that formed the heart of this group: Lambda Legal, the Gay and Lesbian Advocates and Defenders (GLAD), the National Center for Lesbian Rights, and the ACLU. As they continued their work nationwide, they became known as the LGBT Litigator’s Roundtable (the

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<sup>46</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>47</sup> Cathcart, *supra* note 41, at 53.

<sup>48</sup> Cathcart, *supra* note 41.

<sup>49</sup> *Bowers*, 478 U.S. 186.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Cathcart, *supra* note 41, at 54.

“Roundtable”). The strategy on which the Roundtable focused reflected Justice Brennan’s new judicial federalism. Having found the federal courts, and particularly the Supreme Court unwilling to provide protection to gays and lesbians, they took their fight to the states.<sup>53</sup> Between 1986 and 2003, LGBT groups generally, and the Roundtable specifically, work to eliminate fully one-half of the remaining state sodomy laws; that number of states with such laws fell from twenty-six to thirteen.<sup>54</sup> And, in 2002, the Supreme Court granted *certiorari* to another case that had been making its way through the state court system, this one in Texas: *Lawrence v. Texas*.<sup>55</sup>

Just as gay rights groups would later worry that they were bringing marriage equality cases to the Supreme Court too soon, groups fighting sodomy laws were concerned that filing for a petition for a *writ of certiorari* at the Court could result in a setback in what had been a successful march to repeal sodomy laws in the states. Paul Smith, the attorney who argued *Lawrence* on behalf of Lambda Legal, wrote that one of the first questions the group asked him was whether it was “too risky to go back to the Supreme Court with such an important case at that stage of history.”<sup>56</sup> Given that *Bowers* was established precedent, Smith thought it was unlikely that the Court would grant *cert* unless it was going to overrule *Bowers*.<sup>57</sup> Years later, when litigators would have to decide whether to bring marriage equality cases to the Court, they would face the same concerns.

It was, of course, the Supreme Court’s decision in *Lawrence v. Texas* in which it overturned *Bowers* and ruled that the Constitution protected same-sex intimacy between consenting adults.<sup>58</sup> Key to the Court’s decision in *Lawrence* was a 1996 decision striking down a Colorado state constitutional amendment. That Colorado amendment

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<sup>53</sup> Cathcart, *supra* note 41, at 53–54.

<sup>54</sup> Cathcart, *supra* note 41.

<sup>55</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>56</sup> PAUL SMITH, ARGUING *LAWRENCE V. TEXAS* AT THE SUPREME COURT *in LOVE UNITES US* 66 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016).

<sup>57</sup> *Id.*

<sup>58</sup> *Lawrence*, 539 U.S. 558.

barred localities from including sexual orientation as a category along with others such as race and sex, on which they could prohibit discrimination.<sup>59</sup> The Court’s rejection of animus toward homosexuals as a legitimate government interest was crucial to both the *Romer v. Evans* majority and the majority in *Lawrence*, even though the former was based in an equal protection analysis and the latter relied on due process protections.

The *Romer* majority’s reasoning that moral disapproval was not a permissible basis for singling out homosexuals for disparate treatment under the law was particularly important in the Court’s decision to overturn *Bowers*.<sup>60</sup> Writing for the majority in *Lawrence*, Justice Kennedy cited *Romer*’s determination that the constitutional provision was “born of animosity toward the class of persons protected.”<sup>61</sup> In *Lawrence*, the majority went even further to note that were they to apply *Romer*’s equal protection analysis, they could reach a decision without reconsidering *Bowers v. Hardwick*.<sup>62</sup> But they refused to do so. Finding no legitimate interest in the state’s legislation, the Court overturned *Bowers*. Not doing so, Justice Kennedy wrote, “demeans the lives of homosexual persons.”<sup>63</sup> In striking down the Texas sodomy statute on the grounds that it violated the Fourteenth Amendment’s due process clause, the *Lawrence* majority invalidated each of the thirteen remaining state sodomy.<sup>64</sup>

The Court’s decision in *Lawrence* was a clear victory for gay rights advocates, but it also sounded the alarm for those opposed to same-sex marriage. In concluding the majority opinion, Justice Kennedy wrote that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>65</sup> In his dissent, Justice Scalia

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<sup>59</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>60</sup> *Id.*

<sup>61</sup> *Lawrence*, 539 U.S. at 574 (quoting *Romer*, 517 U.S. at 634).

<sup>62</sup> *Lawrence*, 539 U.S. at 558.

<sup>63</sup> *Id.* at 575.

<sup>64</sup> *Id.* at 578.

<sup>65</sup> *Id.*

made his view of Justice Kennedy's assertion clear: "Do not believe it."<sup>66</sup> Justice Scalia's dissent alerted its readers to the coming threat, or promise depending on the readers' views, of marriage equality. According to Justice Scalia, the majority had applied "an unheard-of form of rational basis review"<sup>67</sup> through which "all morals legislation," including laws that would limit marriage to opposite-sex couples, were effectively eliminated.<sup>68</sup> On that point, Justice Scalia and many gay rights activists agreed; having achieved their goal to eliminate state sodomy laws, they fixed their sites on marriage equality.<sup>69</sup>

Eighteen months after the Court invalidated sodomy laws, a group of gay rights leaders met in Jersey City, New Jersey. The group included the members of the Roundtable, as well as the leaders of several other organizations fighting for gay rights. While the members did not all agree that pursuing marriage equality was the best path toward gay rights more generally, they did agree that given the legal and political circumstances in 2005, prioritizing marriage equality was the best course.<sup>70</sup>

They also agreed that the fight was one that should occur in the states, not the federal government.<sup>71</sup> The experience of losing *Bowers* had to have played into this calculation. In a document, "Winning Marriage," that emerged from the Jersey City meetings, the participants make clear that while the goal was marriage equality across the United States, they expected to go to the federal government only once they had largely secured that right in the states; new judicial federalism was instrumental in decriminalizing sodomy and would also be the path toward marriage equality.<sup>72</sup> Matt Coles, Director of the ACLU's Center for Equality and a participant

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<sup>66</sup> *Id.* at 604 (Scalia, J., dissenting).

<sup>67</sup> *Id.* at 587.

<sup>68</sup> *Id.* at 599 (Scalia, J., dissenting).

<sup>69</sup> *Winning Marriage: What We Need to Do*, *supra* note 11.

<sup>70</sup> MATT COLES, THE PLAN TO WIN MARRIAGE *in* LOVE UNITES US 100, 105–06 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016).

<sup>71</sup> *Id.* at 104.

<sup>72</sup> MARK SOLOMON, WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON, 95–96 (2014).

at the Jersey City meetings, made clear, “the effort should start in the courts . . . in the states where the odds of winning were strongest and the odds of a repeal by initiative were smallest.”<sup>73</sup> Coles acknowledged that this strategy was not new; it was essentially the one groups had used to achieve success in *Lawrence*,<sup>74</sup> new judicial federalism.

As leaders from various interest groups met to discuss the best strategy, Coles described a thought experiment one of the Jersey City participants suggested. The group was asked to think about what could be accomplished in particular states over the next ten to fifteen years.<sup>75</sup> The result of this experiment is what came to be known as the 10/10/10/20 plan.<sup>76</sup> The group developed a list of ten states in which they thought they might be able to achieve marriage equality in the next ten to fifteen years, another ten over that same time period in which they might be able to achieve full civil unions—not marriage, but with all of the protections typically afforded married couples, another ten in which they might be able to secure domestic partnerships—with some of the protections of marriage, and twenty other states in which the best they might hope for was improving the political and social climate for gays and lesbians and their families.<sup>77</sup>

Over the next ten years, gay rights activists largely pursued a new judicial federalism strategy in attempting to win nationwide marriage equality. They had already garnered some success in the states, beginning with Massachusetts in 2003. Paramount among the activists’ concerns was preserving marriage equality in Massachusetts and establishing marriage rights for same-sex couples in two to three more states over the next four to five years.<sup>78</sup> Following their 10/10/10/20 plan, they did not seek to win marriage equality in every state in the United States; their goal was to win

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<sup>73</sup> Coles, *supra* note 71, at 104.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 105.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> SOLOMON, *supra* note 68; *Winning Marriage: What We Need to Do*, *supra* note 11, at

enough states and influence enough people that they might persuade the Supreme Court or Congress to act:

Once enough Americans agree that it is wrong to exclude same-sex couples from marriage, and enough states give complete legal protection to same-sex couples (mostly, but not entirely, through marriage), with others giving limited protection as well, the push to get the federal government to require all states to open marriage should probably get under way.<sup>79</sup>

Although there is significant evidence that gay rights activists consciously pursued marriage equality through heavy reliance on new judicial federalism, the strategy included several important distinctions from Justice Brennan's vision. While Brennan's call began and ended in the states courts,<sup>80</sup> the goal for gay rights activists was nationwide recognition of marriage equality. Victories in the state courts were stepping stones on the path to that national recognition.

Activists also saw public education and building public support as important factors in the equation leading to marriage equality. The document emerging from the meetings in Jersey City emphasized the importance of winning not only in the courtroom, but also in the court of public opinion.

While a significant body of research exists on the marriage issue, much of it has focused on how to defeat particular constitutional ballot measures and not on how to move public opinion on the issue of marriage for same-sex couples itself. An innovative, in-depth and creative approach to research, message development, and message dissemination—particularly messages that focus on why marriage represents fairness and the full measure of equality and how to get people to care more deeply about it—is critical.<sup>81</sup>

To the extent that efforts to move public opinion are aimed at achieving success by getting state courts to embrace their own state constitutional protections, these efforts are consistent with Brennan's purely legal argument for new judicial federalism.

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<sup>79</sup> *Winning Marriage: What We Need to Do*, *supra* note 11, 12 at 5–6.

<sup>80</sup> Brennan, *supra* note 13.

<sup>81</sup> *Winning Marriage: What We Need to Do*, *supra* note 11, at 7.

But, the Jersey City group saw a clear path for the shift from state to federal protection of marriage equality even before the federal courts might act to bring recalcitrant states into line by recognizing protections for marriage equality under the Constitution.<sup>82</sup> They figured it was likely that the federal courts, or perhaps Congress, would act to “end discrimination against same-sex relationships that have been sanctioned by the states.”<sup>83</sup> Of course, the Supreme Court was called on to do just that in *Windsor*.<sup>84</sup>

In the wake of early same-sex marriage cases like *Baker v. Nelson*,<sup>85</sup> some states reacted by instituting defense of marriage acts. In 1996, Congress followed suit and passed the federal Defense of Marriage Act, signed into law by President Bill Clinton.<sup>86</sup> That Act stated that the federal government would not recognize same-sex marriage, even if it were legally performed in a state that did grant such recognition. In February 2011, the Obama Administration announced that it believed the federal DOMA to be unconstitutional and would no longer defend the law in court. Given that lack of administrative support and, more importantly, that some states had begun recognizing same-sex marriages, it was only a matter of time until a case involving the federal government’s refusal to recognize a legal same-sex marriage made its way to the courts. In fact, it was about two years.

The 2013 case heard by the Supreme Court concerned a surviving spouse’s use of a marital exemption from federal estate tax. Edith Windsor and Thea Spyer had been together for over forty years by the time they were legally married in Ontario Canada in 2007. New York, where Windsor and Spyer resided, began recognizing same-sex marriages performed in other jurisdictions in 2008. When Spyer died, in 2009, the federal DOMA barred Windsor from a

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<sup>82</sup> *Id.* at 14–15.

<sup>83</sup> *Id.* at 14.

<sup>84</sup> *United States v. Windsor*, 133 S.Ct. 2675, 2679 (2013).

<sup>85</sup> *Baker v. Nelson*, 409 U.S. 810 (1972).

<sup>86</sup> The Defense of Marriage Act, 1 U.S.C. § 7 (1996) and 28 U.S.C. § 1738C (1996).



marital exemption, since the federal government did not recognize her marriage.<sup>87</sup>

A five-Justice majority, which would be mirrored two years later in an even more far-reaching marriage equality decision, held that the federal DOMA was unconstitutional.<sup>88</sup> First, the majority reinforced the states' primacy in defining and recognizing marriage.<sup>89</sup> In failing to recognize state-sanctioned marriage, DOMA flew in the face of that long-standing rule. By refusing to recognize a class of individuals the state sought to protect, the Court ruled that the federal DOMA violated those persons' liberty protected by the Fifth Amendment. In the opinion, Justice Kennedy also noted that by the time *Windsor* was decided by the Supreme Court, New York, as well as eleven other states and the District of Columbia, also allowed same-sex marriage.<sup>90</sup> In doing so, the Court recognized the back and forth between the state and federal courts as they established further protections on the road to marriage. Many of these states had recognized marriage equality as protected by their own state constitutions. That might lead to the kind of protection Justice Brennan envisioned when he wrote about new judicial federalism in 1977, but state protections alone would not provide full recognition; they did not provide equality. The existence of the federal DOMA allowed the Court to take the next step toward marriage equality at a time when only a minority of states recognized it.

After the Supreme Court struck down the federal Defense of Marriage Act in 2013, the federal courts seemed to be reading from the Jersey City group's playbook.<sup>91</sup> With *Windsor* as precedent, legally married same-sex couples took to the federal courts to force states to recognize legal marriages performed elsewhere and to provide same-sex marriage within their own jurisdictions. Federal

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<sup>87</sup> *Windsor*, 133 S.Ct. at 2682.

<sup>88</sup> Justice Kennedy wrote the opinion for the Court and was joined by Justices Ginsburg, Breyer, Sotomayor and Kagan. Chief Justice Roberts and Justices Scalia, Thomas and Alito filed a number of dissenting opinions. *Windsor*, 133 S.Ct. 2675.

<sup>89</sup> The opinion also addressed jurisdictional concerns that are outside the scope of the present discussion. *Id.* at 2682.

<sup>90</sup> *Id.* at 2689.

<sup>91</sup> *Winning Marriage: What We Need to Do*, *supra* note 11.

district and appellate courts across the United States sided almost entirely with same-sex couples’ arguments that state failure to provide marriage equality violated both the Constitution’s equal protection and due process clauses. However, the lower courts were not entirely in agreement. Once the United States Court of Appeals for the Sixth Circuit reversed lower federal district courts’ decisions striking down state bans on same-sex marriage creating a split amongst the federal circuit courts,<sup>92</sup> the Supreme Court was finally ready to confront the question of marriage equality under the Constitution.

In *Obergefell v. Hodges* (and consolidated cases), the majority declared that the due process and equal protection clauses of the Fourteenth Amendment required states to recognize same-sex marriage.<sup>93</sup> Twelve years earlier, in his dissenting opinion in *Lawrence v. Texas*, Justice Scalia wrote: “Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”<sup>94</sup> He was correct. Justice Kennedy, writing for the *Obergefell* majority, recalled that *Lawrence*’s protection of intimate association between consenting adults, regardless of their sex, is nonsensical if it stops at decriminalizing sexual intimacy.<sup>95</sup> “Outlaw to outcast may be a step forward,” he wrote, “but it does not achieve the full promise of liberty.”<sup>96</sup>

As had been the case in *Windsor*, Justice Kennedy devoted ample attention to the role of the state courts and state constitutions in leading to nation-wide marriage equality.<sup>97</sup> Crucial to the Court’s decision to weigh in on marriage equality was the degree to which a “new and widespread discussion” of same-sex marriage had occurred

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<sup>92</sup> DeBoer v. Snyder, 772 F. 3d 388, 421 (2014); Erik Eckholm, *Court Upholds Marriage Ban in Four States*, N.Y. TIMES (Nov. 6, 2014), <https://www.nytimes.com/2014/11/07/us/appeals-court-upholds-same-sex-marriage-ban.html>.

<sup>93</sup> *Obergefell v. Hodges*, 133 S.Ct. 2584, 2604 (2015).

<sup>94</sup> *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

<sup>95</sup> *Obergefell*, 135 S.Ct. at 2600.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 2595–97.

across the United States.<sup>98</sup> The majority pointed to the Hawaii Supreme Court's 1993 decision as instigating much of this discussion.<sup>99</sup> In *Baehr v. Lewin*, the court concluded the classifications based on sex, like laws banning same-sex marriage, would be subject to the high bar of strict scrutiny.<sup>100</sup> Although that decision did not result in marriage equality in Hawaii, it prompted debates about marriage equality across the country.<sup>101</sup> In some states those debates led to legislation banning same-sex marriage and in others, laws creating civil unions or domestic partnerships. In some states the states courts were the forums for that debate; indeed, the majority specifically mentioned the landmark ruling by the Supreme Judicial Court of Massachusetts holding that their state constitution protected the right of same-sex couples to marry.<sup>102</sup> What is particularly clear in the majority's opinion is the importance of state courts and state constitutional law in shaping the debate that would eventually turn on federal constitutional protections.

In fact, the Supreme Court emphasized the importance of these lower federal and state court decisions, as well as state legislation, by including two appendices to its opinion.<sup>103</sup> Appendix A lists all state and federal judicial decisions concerning marriage equality including United States Courts of Appeals decisions, United States District Court decisions and state high court decisions. Appendix B includes all state judicial and legislative action legalizing same-sex marriage. Had William Brennan been alive, he might well have written an addendum to his Harvard Law Review article and called it, "State Constitutionalism and the Protection of Individual Rights: The Case of Marriage Equality."

But, it is worth emphasizing the important twist on judicial federalism discussed earlier in this paper and that Justice Kennedy

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<sup>98</sup> *Id.* at 2597.

<sup>99</sup> *Id.*

<sup>100</sup> *Baehr v. Lewin*, 74 Haw. 530, 580 (1993).

<sup>101</sup> KLARMAN, *supra* note 36, at 56–60.

<sup>102</sup> *Obergefell*, 135 S.Ct. at 2597.

<sup>103</sup> *Id.* at 2608–11.

calls out in the *Obergefell* majority opinion:<sup>104</sup> the state decisions on marriage equality were happening “against this background” of the Supreme Court’s decisions in *Bowers v. Hardwick*,<sup>105</sup> *Romer v. Evans*,<sup>106</sup> and *Lawrence v. Texas*.<sup>107</sup> Neither the actions of the state courts, nor that of the Supreme Court, occur in a legal vacuum. The Jersey City group knew that and planned accordingly. “At first, marriage will have to be won in the states, through state courts and state legislatures. Only after we have won in many states are we likely to be able to get the Supreme Court or Congress to insist that ‘hold out’ states get in line.”<sup>108</sup>

By the time the Supreme Court reached its *Obergefell* decision, marriage equality was already a reality in thirty-six states and the District of Columbia. The Jersey City group’s 10/10/10/20 plan had seriously underestimated the movement’s success and timetable. In 2015, only ten years after they summed up their work in the strategy memo, “Winning Marriage: What We Need to Do,” marriage equality was the law across the United States. Their state-level strategy, which allowed for a piecemeal process utilizing the tenets of new judicial federalism, laid the necessary groundwork for the Supreme Court to “bring the ‘hold-out’ states into line” as required by the Constitution.

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<sup>104</sup> *Obergefell*, 135 S.Ct. at 2597. In the majority opinion, Justice Kennedy distinguishes these state constitutional cases concerning marriage equality from the Court’s decisions on other gay rights issues.

<sup>105</sup> 478 U.S. 186 (1986).

<sup>106</sup> 517 U.S. 620 (1996).

<sup>107</sup> 539 U.S. 558 (2003).

<sup>108</sup> *Winning Marriage: What We Need to Do Now*, *supra* note 11, at 14.